

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR PEREZ-MARQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47691

FILED

JAN 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, upon jury verdict, of first-degree murder with the use of a deadly weapon, first-degree kidnapping, battery with intent to commit a crime, and first-degree arson. Fifth Judicial District Court, Nye County; John P. Davis, Judge. The district court sentenced appellant Oscar Perez-Marquez (Perez) to three consecutive sentences of life without the possibility of parole in addition to a consecutive term of 8 to 20 years. The remaining sentence was imposed concurrently.

In his first trial, the district court convicted Perez, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, first-degree kidnapping, battery with the intent to commit a crime and first-degree arson. On appeal, we reversed Perez's convictions and remanded the case for a new trial. See Perez-Marquez v. State, Docket No. 42561 (Order of Reversal and Remand, September 8, 2005). On retrial, the district court convicted Perez pursuant to a jury verdict of the aforementioned charges. This appeal followed.

Perez argues that the district court erred in not inquiring outside of the jury's presence whether his brother, Damien Perez-Marquez (Damien), was going to exercise his Fifth Amendment right to remain silent before allowing Damien to take the witness stand, as required by

this court's holding in Silva v. State, 113 Nev. 1365, 1373, 951 P.2d 591, 596 (1997). Further, Perez argues that his right to cross-examination under the Confrontation Clause was violated by the district court when it allowed Damien to take the stand.

When a witness remains silent on the witness stand but the trial court allows the State to continue questioning that witness, the defendant is “denied . . . the right of cross-examination secured by the Confrontation Clause” of the Sixth Amendment. Id. at 1372, 951 P.2d at 595 (quoting Douglas v. Alabama, 380 U.S. 415, 419 (1965)). Further, the witness' silence creates an implication that the defendant is guilty of the crimes charged and, because defense counsel is denied the right of cross-examination to mitigate this implication, this implication adds “critical weight to the prosecution's case.” Id. at 1373, 951 P.2d at 596 (quoting Douglas, 380 U.S. at 420). Therefore, when it becomes apparent that a witness is not going to answer questions, the district court should stop the questioning and investigate the matter outside the presence of the jury. Id. at 1373, 951 P.2d at 596.

Here, the district court first learned that Damien might not testify when the State informed the district court that Damien had said that he was “going to have a case of I don't know or I don't remember or something else.” Perez then requested that the district court conduct an investigation into what Damien planned to do once he was on the witness stand, but the district court denied Perez's request and allowed Damien to take the stand. Damien then took the stand and refused to answer any questions posed to him by the district attorney.

We conclude that the district court erred in failing to stop the State's examination of Damien and conduct an investigation into the


matter outside the presence of the jury once it became apparent that Damien would not answer any questions posed to him. Further, the district court erred by allowing the State's examination of Damien to continue when it was clear that Damien was going to remain silent. The district court's error resulted in a violation of Perez's right to cross-examination under the Confrontation Clause.


Confrontation Clause errors are subject to a harmless error analysis. Power v. State, 102 Nev. 381, 384, 724 P.2d 211, 213 (1986); accord Coy v. Iowa, 487 U.S. 1012, 1021 (1988). “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). The party who benefited from the error has the burden of showing that the error was harmless beyond a reasonable doubt. Id. In determining whether an error is harmless, we consider “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution’s case.” Id. at 355, 143 P.3d at 477 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

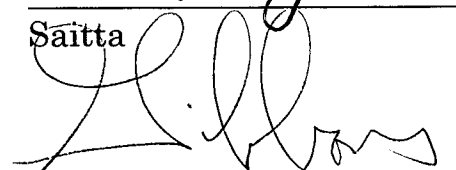
We conclude that the district court’s error which led to a violation of Perez’s right to cross-examination under the Confrontation Clause was not harmless beyond a reasonable doubt. No witness presented by the State at trial testified to any facts that occurred with regard to Perez’s involvement the night of the murder. Therefore, the overall strength of the State’s case without the improper implications

resulting from the State's examination of Damien was weak. Thus, we conclude that the error was not harmless. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

¹Perez also raises the following issues on appeal: (1) whether the district court erred when it permitted the State to elicit hearsay testimony and statements regarding whether certain witnesses were fearful, (2) whether the district court erred in denying Perez's challenge to the entire jury venire due to a lack of Hispanic representation, (3) whether prosecutorial misconduct warrants reversal of the judgment of conviction, (4) whether the district court improperly permitted the State to introduce evidence of Perez's finances, improperly implying that Perez was committing prior bad acts in order to accumulate property, (5) whether security measures, imposed after the courthouse received a bomb threat, were prejudicial and deprived Perez of a fair trial, (6) whether the district court erred in refusing to give jury instructions requested by Perez, and (7) whether cumulative error warrants reversal. Since we conclude that Perez's convictions must be reversed because his right to cross-examination under the Confrontation Clause of the Sixth Amendment was violated, we need not address the other issues raised on appeal.

cc: Hon. John P. Davis, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk